

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Arthur A. Hamaoka; Kimi Hamaoka-Sinha

OBJECTORS: Arthur A. Hamaoka; Kimi Hamaoka-Sinha

CASE 76D-0234-R-2023
76D 34711-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER’S REPORT

Statement of the case

Claimants, Arthur A. Hamaoka and Kimi Hamaoka-Sinha, filed an objection to the purpose of domestic claim 76D 34711-00. The objection requested generation of implied claims for stock and irrigation purposes.¹

Domestic claim 76D 34711-00 appeared in the Preliminary Decree with the following issue remark.

THE CLAIMED MEANS OF DIVERSION CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim.

Montana law requires the Water Court to resolve objections and issue remarks. Claimants/objectors provided a declaration resolving the issue remark. An order provided claimants/objectors the opportunity to refute this Master’s review of the record and conclusion that not enough evidence existed to support generation of implied claims for irrigation or stock use from domestic claim 76D 34711-00. Claimants/objectors filed a Response, adding an additional argument that the court should recognize exempt claims for irrigation and stock, if it denied the request to generate implied claims for irrigation and stock.

Issues

1. What is the historically accurate means of diversion for domestic claim 76D 34711-00?
2. Is the means of diversion issue remark resolved?
3. Should the Court generate an implied claim for stock or irrigation from domestic claim 76D 34711-00?

¹ Based upon the language of the objection, it appears claimants may need to file a change application for the purpose of claim 76D 34711-00 with the DNRC because the change to purpose occurred after July 1, 1973.

4. Should the Court adjudicate exempt claims for claimants/objectors?

Findings of fact

1. A preponderance of evidence establishes the historically accurate means of diversion for claim 76D 34711-00 is bucket.
2. There is no indication on the statement of claim or its attachments that supports generation of an implied irrigation or stock claim from domestic claim 76D 34711-00.
3. There are no exempt claims for the Court to adjudicate.

Principles of law

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. The Montana Water Court shall request additional evidence if the settlement agreement expands or enlarges an element of a claim and the burden of proof is not met. If additional evidence does not meet the burden of proof, the element shall not be expanded or enlarged. Rule 17(b), W.R.Adj.R.

5. When resolving issue remarks, the Montana Water Court must weigh the

information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

6. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

7. The Water Court has acknowledged its authority to generate implied claims during adjudication. *Bergin v. Nelson*, Case 40C-47 at p. 16, (MT Water Court Memorandum Opinion Feb. 21, 2001); *See* Rule 35, W.R.C.E.R. If a statement of claim was timely filed, and the form contains multiple rights, the statutory deadline set by § 85-2-221, MCA has been met for the multiple rights. *Bergin* at p. 16.

8. Pursuant to *Eliasson Ranch Company v. Rodeghiero*, Case 40A-115 at p. 4-5, (MT Water Court Order Amending and Adopting Master's Report Jun. 28, 2004). When generating an implied claim the following guidelines apply.

- An implied claim may be generated based only on the attachments to a statement of claim, but typically it is based on the statement of claim itself.
- There is usually evidence of two or more claims on the face of the statement of claim, most commonly indicated by an overstatement of an element, or the identification of multiple purposes, multiple priority dates, or multiple sources.
- The generation of an implied claim must come from the statement of claim as originally filed.

“A statement of claim cannot be amended after the filing deadline or changed through the objection process to expand the elements of the filed statement of claim and thereby create the groundwork to add additional water rights through the implied claim process. The implied claim process cannot be used to circumvent the claim filing process in order to cure a failure to file a water right claim in a timely fashion. That practice would be contrary to the late claim provisions of the statutes.” Section 85-2-221 and 85-2-225, MCA. *Adjudication of Water Rights of Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992) (emphasis added).

9. *Foss v. United States*, 2013 Mont. Water LEXIS 17 at *32 (Jan. 31, 2013), added an additional layer of review to the above analysis for generating implied claims. Three criteria must be met by the party requesting an implied claim.

- Evidence corroborating the actual historic use of the implied claim must exist.
- Supplemental evidence that explains or clarifies the statement of claim may be considered.
- The creation of an implied claim should not change the historic use of water or increase the historic burden on other water users.

If these criteria are not met, water rights are lost even when “ample evidence of historic use otherwise exists” thereby establishing “an appropriate balance between recognition of legitimate claims and upholding the substance of the forfeiture statute.” Section 85-2-226, MCA.

10. “‘Existing right’ or ‘existing water right’ means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Section 85-2-102(13), MCA

11. Exempt rights are existing rights for stock or domestic use of groundwater or instream flow. Section 85-2-222(1), MCA.

Analysis

Issues 1 and 2 – means of diversion; issue remark resolution

The Declaration of Arthur A. Hamaoka includes the following evidence:

- Mr. Hamaoka is 92 years old.
- Mr. Hamaoka purchased the property in 1976.
- The original cabin is at a higher elevation than the only source of water available for the cabin.
- No water lines or pumping facilities were installed before July 1, 1973, to convey water from the source to the cabin.
- From 1976 to 1984, Mr. Hamaoka’s daughters carried buckets of water

from the source to the cabin.

Conclusions of law

Mr. Hamaoka's Declaration overcomes prima facie statement of claim 76D 34711-00, justifies the modification to the claim, and resolves the means of diversion issue remark on the claim.

Issue 3 – request to generate implied claim

Claimants/objectors failed to meet the required criteria for supporting their request to generate implied claims for irrigation and stock from domestic claim 76D 34711-00. Claimants/objectors state that “Clearly, purely domestic use would not have required the claimants to list the number of acres irrigated.” (Feb. 27, 2023, Statement, p. 3) However, Water Right Claim Examination Rules 18 and 19 discuss the inclusion of up to 5.00 acres of irrigation for domestic purposes, the volume guidelines for domestic irrigation and household use, and the determination of the number of households served by the claim. Furthermore, the “state’s official claim form” was color-coded for each purpose: a blue statement of claim form for domestic use (including an entry for the number of domestic acres irrigated which Simone Hamaoka filled out with 1.50 acres), a brown statement of claim form for stock use, a green statement of claim form for irrigation use, and a red statement of claim form for other uses. (See Feb. 27, 2023, Statement, pp. 2-3) Claimants/objectors did not meet the first criteria for generating an implied claim. There is no information on the domestic statement of claim form or its attachments indicating the water right claimed by Simone Hamaoka was used before July 1, 1973, for anything other than domestic irrigation.

Conclusions of law

Claimants/objectors provided evidence to address their objection. However, the evidence did not support the resolution proposed by their objection. Implied claims for irrigation and stock purposes should not be generated from domestic claim 76D 34711-00. The objection should be dismissed.

Issue 4 – request to adjudicate exempt claims

In 2013 and 2017, the Montana Legislature amended § 85-2-222, MCA, and provided for the filing of exempt claims subject to specified terms and conditions. Exempt claims are existing rights for stock or domestic use of groundwater or instream flow. Section 85-2-222(1), MCA.

The exempt claim filing deadline for the State of Montana was June 30, 2019. Irrigation, by definition, is not a purpose that may be filed on for existing exempt claims. Claimants/objectors failed to timely file an exempt claim for direct from source stock use by the deadline. Existing exempt rights not filed by the deadline are not forfeited but are subordinated to all timely filed exempt claims. Exempt claims not filed by the deadline are not included in the Water Court’s adjudication and do not appear in Water Court decrees. Section 85-2-222, MCA.

Conclusions of law

Claimants/objectors provided evidence to address their objection. However, the evidence did not support the resolution proposed by their objection. There are no exempt claims for the Court to adjudicate and include in the Basin 76D decree. The objection should be dismissed.

Recommendations

Domestic claim 76D 34711-00 should be modified as follows to accurately reflect historical use.

MEANS OF DIVERSION:

FLOWING

BUCKET

The means of diversion issue remark should be removed from the claim abstract. Claimants’ objections should be dismissed.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm implementation of the recommendations in the state’s centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 34711-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ARTHUR A HAMAOKA
1258 HAMAOKA DR
TROY, MT 59935

KIMI HAMAOKA-SINHA
1258 HAMAOKA DR
TROY, MT 59935

Priority Date: SEPTEMBER 17, 1943

Type of Historical Right: USE

Purpose (use): DOMESTIC

Flow Rate: 15.00 GPM

Volume: 1.50 AC-FT

Households: 1

Maximum Acres: 1.50

Source Name: UNNAMED TRIBUTARY OF PORCUPINE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | S2NESW | 21 | 30N | 33W | LINCOLN |

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: BUCKET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 1.50 | | S2NESW | 21 | 30N | 33W | LINCOLN |

Total: 1.50